IN THE

Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-9921

CARLOS M. MARTINEZ,
Petitioner

v.

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent to the Internal Revenue Service,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM BENJAMIN HOUSE, JR.
711 Main Street, Suite 700
Houston, Texas 77002
(713) 229-8681

Counsel for the Petitioner

Bowne of Houston, Inc. Printed in U.S.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Legend

Abbreviations:
I.R.C. — Internal Revenue Code
I.R.S. — Internal Revenue Service

In The

Supreme Court of The United States

October Term, 1975

No. .....

Carlos M. Martinez,

Petitioner

v.

United States of America and John T. Russell,
Special Agent to the Internal Revenue Service,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Carlos M. Martinez respectfully prays that a writ of certiorari issue to review the United States Court of Appeals for the Fifth Circuit *per curiam* affirmance of the order issued by the United States District Court, Southern District of Texas, Houston Division. which required Mr. Martinez to comply with eight (8) I.R.S. summons requesting production of certain books and records. Said *per curiam* affirmance occurred on August 5, 1975 and Mr. Martinez's Petition for Rehearing was denied on October 3, 1975.

OPINION BELOW

The United States District Court, Southern District of Texas, Houston Division, the Honorable Carl O. Bue presiding, filed a "Bench Ruling" (R.A. 82) on February 10, 1975; requiring Mr. Martinez to comply "in all respects with the eight (8) [I.R.S.] summonses issued on July 31, 1974, pertaining to the corporate records [in question]" (*emphasis ours*) (R.A. 83). Further, findings of the Trial Court were as follows: that the instant case involved only a civil investigation conducted by the I.R.S. to determine whether Mr. Martinez should be liable for further taxes and that the testimony of John T. Russell, an I.R.S. special agent, was uncontroverted as to the investigation being conducted solely to determine whether Mr. Martinez owes more tax and that no criminal investigation has ever been put into operation (R.A. 84, 85); the summonses issued requested only production of certain corporate records of the eight (8) named corporations or entities, the reasons prompting the request for production of the corporation records were good faith reasons, have occurred well prior to any possible criminal prosecution, and there has been no evidence to indicate that any criminal prosecution will ever occur (R.A. 85); that the burden to prove deficiencies in the summonses is on Mr. Martinez because of the "good faith" issuance (R.A. 86); that the Court was at a total

loss to understand how a person who refuses to acknowledge his affiliation with a corporation or entity has the right to claim any privilege regarding records which belong to the corporation (R.A. 86); the conclusion, based on the evidence, that Mr. Martinez was indeed, and in fact, the custodian of records of the entities involved (R.A. 87); that the Fifth Amendment privilege does not extend to a custodian of corporate records or a possessor of records of a collective entity which are possessed in a representative capacity even though such records might incriminate the custodian or possessor personally (R.A. 88); that the custodian must produce and identify or authenticate the corporate records summoned and so must Mr. Martinez (R.A. 88, 89); and "that the Petition to Enforce the summonses referred to in this case should be, and hereby is, granted. The Respondent Martinez is directed to comply immediately by producing all of the requested materials described in the summonses" (R.A. 90).

JURISDICTION

Mr. Martinez's Petition for Rehearing was denied by the Court of Appeals for the Fifth Circuit on October 3, 1975. This petition for the writ of certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the Government's failure to plead or prove "that the information sought is not already within the Commissioner's possession" requires reversal of the judicial ruling that the Petitioner must comply with the eight (8) I.R.S. summonses.

STATEMENT OF THE CASE

This is an appeal of an affirmance by the United States Court of Appeals for the Fifth Circuit of an order entered by the United States District Court for the Southern

District of Texas, Houston Division, granting enforcement of summonses issued pursuant to Section 7602 IRC 1954. The proceeding was brought by the United States and John T. Russell, Special Agent of the Internal Revenue Service under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954. The District Court ordered compliance in all respects but stayed its order during pendency of the appeal.

The facts pertinent to the question presented for review, set forth within the context of time to the events as reflected by the record on appeal, are as follows:

John T. Russell is a special agent with the Internal Revenue Service Intelligence Division (R.A. 47). Mr. Russell was assigned to investigate the tax liability, for the calendar years 1970, 1971 and 1972, of the Petitioner, Carlos M. Martinez, and further, to determine if Mr. Martinez had been in violation of any provision of the Internal Revenue Service Code (R.A. 48). Mr. Russell, in the course of his investigation, went to 9302 Leader, Houston, Texas, unannounced (R.A. 60), contacted Mr. Martinez personally, on February 11, 1974, (R.A. 48-49) and "before engaging in conversation with Mr. Martinez" (R.A. 48) he advised Mr. Martinez of his constitutional rights by reading them from a prepared statement that Mr. Russell carries with him (R.A. 48), later determined to be a *Miranda* warning (R.A. 61). Subsequent to the *Miranda* warning, Mr. Russell and Mr. Martinez engaged in conversation whereupon Mr Russell learned that Mr. Martinez was President of one (1) corporation and General Manager of six (6) others (R.A. 49, 50) and Mr. Martinez learned that Mr. Russell was an I.R.S. special agent who, among other things, investigates for violations of the criminal tax laws (R.A. 60).

Sometime after February 11, 1974, Mr. Russell obtained copies of the Articles of Incorporation and the forfeiture

of the Charter of General Ornament Corporation under the seal of the Secretary of State for the State of Texas (R.A. 52). Said copies indicated that Carlos M. Martinez was an incorporator, initial director, the registered agent for service, and that the registered office was 9302 Leader, Houston, Texas 77036, (R.A. 52). Mr. Russell had also obtained photocopies of a State of Texas Corporation Franchise Tax Report and a Form 1120, U.S. Corporation Income Tax Return, for Transcontinental Artist Corporation for years 1969 and 1970, all of which reflects that a Charles M. Martinez signed the forms as Corporate President (R.A. 54-56).

Mr. Russell issued eight (8) summonses addressed to the eight (8) Corporations involved (R.A. 57). Two (2) were addressed to "Carlos Martinez, President" (R.A. 15, 17) and six (6) were addressed to "Carlos Martinez, Custodian of Records" (R.A. 19, 21, 23, 25, 27, and 29). Mr. Russell personally served Mr. Martinez with the eight (8) summonses (R.A. 57) on July 31, 1974 (R.A. 16, 18, 20, 22, 24, 26, 28, and 30). Each summons was titled "In the matter of the tax liability of Carlos M. Martinez", for the "Periods 1970, 1971, and 1972", and requested the production of the exact same items of each different Corporation and the giving "of testimony relating to the tax liability or the collection of the tax liability of the above named person for the periods designed" (R.A. 15-29). These summons were identified as "Internal Revenue Service Summons, Form 2030" (R.A. 57). Mr. Martinez and the Corporations were directed to appeal before Mr. Russell on August 12, 1974 (R.A. 15-29); all parties, with their attorney, appeared on said date but refused to comply with the summonses by producing the books, records and other documents demanded in the summonses (R.A. 8).

On January 7, 1975, the Government filed a "Petition to Enforce Internal Revenue Summons" (R.A. 1) requesting all persons named in each summons to "show cause" why

they "should not comply with and obey the summonses" in each and every requirement (R.A. 9) and the entering of an order by the trial court directing all said persons to obey the summonses in each and every requirement by ordering the attendance and production of the records as is required and called for by the terms of the summonses (R.A. 9, 10). The Petition was supported by the Affidavit of special agent John T. Russell (R.A. 11-14) which he swore to on October 10, 1974 (R.A. 14), in which he stated that it was "necessary to examine the requested books, records and other papers demanded by the summonses in order to ascertain the correct income tax liability of Carlos M. Martinez for the years 1970 through 1972" (R.A. 14).

The Honorable Carl O. Bue, Jr., United States District Judge for the Southern District of Texas entered an "Order to Show Cause" on January 22, 1975, ordering all parties named in each summons to appear in court on February 11, 1975, to show cause why they should not be compelled to produce the records demended by said summonses and giving the Respondents five (5) days after service of the Government's Petition and Exhibits to file a written response to same (R.A. 32). On January 28, 1975, the "Response of Carlos M. Martinez, Individually" was filed (R.A. 32). Said response contained, essentially, a declination to admit or deny that he was a Respondent in any of the capacities named in the Government's Petition (R.A. 32-36), that the response filed was on behalf of Mr. Martinez as an individual only (R.A. 32-36), that his declination to "admit or deny" was based on his exercising his Fifth Amendment privilege against self-incrimination (R.A. 32-36) as was his failure to produce any records because such would constitute an admission of direction, control and responsibility of and for the conduct of the entities named in the summons (R.A. 35). Further, the response asserted that the summonses was *ad testificandum* as well as *duces tecum* and as such they were an attempt to compel

Mr. Martinez to give incriminatory evidence (R.A. 35) and, for all of the above reasons, requested that the Government's Petition be denied (R.A. 36).

The Government, at the February 10, 1975 hearing on the "Order to Show Cause", limited its request for compliance with the summonses to entail only the request for the production of the corporate records and books enumerated in each of the eight (8) summons (R.A. 39) and stated that the government was not seeking "any personal testimony from Mr. Martinez" (R.A. 39). Further, Mr. Russell stated that he had not yet completed his investigation of Mr. Martinez's tax liability (R.A. 58), that he had not ever made any recommendation for criminal prosecution of Mr. Martinez as a result of this investigation (R.A. 58), that he had not formed in his mind any intent to make a recommendation for said criminal prosecution at the time of the hearing in question, at the time the summonses were issued, or at any time since the investigation began (R.A. 58), and that the only reason the requested books and records listed in the summonses were necessary for the completion of his investigation was to determine Mr. Martinez's gross income for the years 1970, 1971 and 1972 (R.A. 58, 59).

The United States District Court, Southern District of Texas, Houston Division, the Honorable Carl O. Bue presiding, filed a "Bench Ruling" (R.A. 82) on February 10, 1975; requiring Mr. Martinez to comply "in all respects with the eight (8) [I.R.S.] summonses issued on July 31, 1974, pertaining to the corporate records [in question]" (*emphasis ours*) (R.A. 83). Further, findings of the Trial Court were as follows: that the instant case involved only a civil investigation conducted by the I.R.S. to determine whether Mr. Martinez should be liable for further taxes and that the testimony of John T. Russell, an I.R.S. special agent, was uncontroverted as to the investigation being conducted solely to determine whether Mr. Martinez owes

more tax and that no criminal investigation has ever been put into operation (R.A. 84, 85); the summonses issued requested only production of certain corporate records of the eight (8) named corporations or entities, the reasons prompting the request for production of the corporation records were good faith reasons, have occurred well prior to any possible criminal prosecution, and there has been no evidence to indicate that any criminal prosecution will ever occur (R.A. 85); that the burden to prove deficiencies in the summonses is on Mr. Martinez because of the "good faith" issuance (R.A. 86); that the Court was at a total loss to understand how a person who refuses to acknowledge his affiliation with a corporation or entity has the right to claim any privilege regarding records which belong to the corporation (R.A. 86); the conclusion, based on the evidence, that Mr. Martinez was indeed, and in fact, the custodian of records of the entities involved (R.A. 87); that the Fifth Amendment privilege does not extend to a custodian of corporate records or a possessor of records of a collective entity which are possessed in a representative capacity even though such records might incriminate the custodian or possessor personally (R.A. 88); that the custodian must produce and identify or authenticate the corporate records summoned and so must Mr. Martinez (R.A. 88, 89); and "that the Petition to Enforce the summonses referred to in this case should be, and hereby is, granted. The Respondent Martinez is directed to comply immediately by producing all of the requested materials described in the summonses" (R.A. 90).

Mr. Martinez filed his Notice of Appeal (R.A. 90) and Motion For a Stay (R.A. 91-93) on February 14, 1975 (R.A. 90, 91). The Honorable Judge Bue entered the Order Granting Motion to Stay Enforced of Bench Ruling on February 20, 1975, (R.A. 93) since said ruling is a final appealable order (R.A. 94).

REASONS FOR GRANTING THIS WRIT

The Court of Appeals for the Fifth Circuit's per curiam affirmance of the District Court's "Bench Ruling" conflicts with this Court's decision of *United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964), and its progeny. Further, said affirmance conflicts with decisions of other Courts of Appeals, and with decisions within the Fifth Circuit, requiring the Government to plead or prove that the enforcement of the I.R.S. summonses is necessary because the information sought is not already within the Commissioner's possession. Only an authorative decision by this Court can reconcile the conflict among the Circuits and within the Fifth Circuit.

The "Bench Ruling" by the District Court ordering Mr. Martinez to comply with the eight (8) I.R.S. summonses in question was issued despite the fact that the record of the proceedings before the Honorable Carl O. Bue, Jr., reflects a complete and total absence of even a scintilla of evidence that the enforcement of the I.R.S. summonses was necessary because the information sought by the Government was not already within the Commissioner's possession. A comprehensive reading of the record of said proceedings reveals that the Government totally failed to either allege in their pleadings or offer any testimony as evidence at the "Show Cause" hearing of February 10, 1975, on the issue of whether or not the Commissioner was in possession of the items requested for production by the eight (8) summonses issued.

This Court, in *United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964), set forth the minimum standards of proof the Government must meet before a petition for enforcement of an I.R.S. summons can be granted by a Federal District Court. In *Powell*, 379 U.S. at 57-58, 85 S.Ct, at 255, this Court held said minimum standards to be that the Commissioner must show

> "• • • that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be rele-

> vant to the purpose, *that the information sought is not already within the Commissioner's possession,* and that the administrative steps required by the [Internal Revenue] Code have been followed • • •.
>
> • • • This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered.• • •" (*Emphasis ours*)

This Court further recognized that it was the Court's processes that are invoked to enforce the administrative summons of the I.R.S. and a Court may not permit its process to be abused but the taxpayer has the burden of showing such an abuse of the Court's process. *Powell,* 379 U.S. at 58, 85 S.Ct. at 255. *Powell* had a companion case, *Ryan* v. *United States,* 379 U.S. 61, 85 S.Ct. 232 (1964), which raised only one issue on appeal: whether the Government must show probable cause for its examination of the records, i.e., whether the Government must show probable cause before a Court can properly invoke its process by granting the Government's "Petition for Enforcement" of an I.R.S. summons? *Ryan,* 379 U.S. at 62, 85 S.Ct. at 233. *Powell* posed the same issue and *Ryan* was affirmed "for the reasons given in United States v. Powell, 379 U.S. 48, 85 S.Ct. 248 [255 (1964)]" (*emphasis ours*). *Ryan,* 379 U.S. at 62, 85 S.Ct. at 233. *Donaldson* v. *United States* 400 U.S. 517, 526-527, 91 S.Ct. 534, 540 (1971), explained the rationale of the *Powell* and *Ryan* decisions being bottomed on the fact that the United States Supreme Court was primarily concerned with the "standards the Internal Revenue Service must meet in order to obtain judicial enforcement of its orders". See also *United States* v. *Matras,* 487 F.2d 1271, 1274 (8 Cir. 1971). *Donaldson* reiterated the rationale of the *Powell* decision in that at the adversary hearing to which the taxpayer is entitled before enforcement is ordered, he may challenge the summons on any appropriate ground and that the burden of showing an abuse of the Court's process is on the taxpayer. 400 U.S. at 527, S.Ct. at 540. Thus, the fact that *Powell* is still a viable and precedential decision in our jurisprudence cannot be contradicted.

The conflict in the circuits exist because of the differing views in the analysis and application of *Powell* and its progeny. The numerous decisions, in the analyzation of the *Powell* progeny, have all recognized certain enumerated "constants" in the formulation of this area of jurisprudence. The "constants" are as follows: (1) the I.R.S., in order to obtain judicial enforcement of an administrative summons must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed, *Donaldson, supra; United States* v. *Newman,* 441 F.2d 165, 169 (5 Cir., 1971); *United States* v. *Vey,* 324 F.Supp. 552 (D.D.Pa., 1971); *United States* v. *Pritchard,* 438 F.2d 969 (5 Cir., 1971); *United States* v. *Schoeberlein,* 335 F.Supp. 1048 (D.Md., 1971); *United States* v. *Mothe,* 303 F.Supp. 1366 (E.D.La., 1969); *United States* v. *Giordana,* 419 F.2d 564 (8 Cir., 1969); *United States* v. *Acker,* 325 F.Supp. 857 (S.D.N.Y., 1971); *McGarry's, Inc.* vs. *Rose,* 344 F.2d 416 (1 Cir., 1965); *Wild* v. *United States,* 362 F.2d 206 (9 Cir., 1966); *United States* v. *Berkowitz,* 355 F.Supp. 897 (E.D.Pa., 1973); *United States* v. *Williams,* 337 F.Supp. 1114 (S.D.N.Y., 1971); *United States* v. *Egenberg,* 443 F.2d 512 (3 Cir., 1971); *United States* v. *Bell,* 448 F.2d 40 (9 Cir., 1971); *United States* v. *Troupe,* 317 F.Supp. 416 (W.D.Mo., 1970) *United States* v. *Harrington,* 388 F.2d 520 (2 Cir., 1968); *United States* v. *Matras, supra; United States* v. *Roundtree,* 420 F.2d 845 (5 Cir., 1969); *Venn* v. *United States,* 400 F.2d 207 (5 Cir., 1968); *United States* v. *Howard* 360 F.2d 373 (3 Cir., 1966); (2) the taxpayer is entitled to an adversary hearing before enforcement of the I.R.S. administrative summons can be ordered, *Donaldson, supra; Newman, supra; Roundtree, supra; McGarry's, Inc., supra;*

Vey, supra; United States v. *Campbell,* 390 F.Supp. 711 (D.S.D., 1975); *Howard, supra;* and (3) the taxpayer has the burden of showing an abuse of the Court's process when contesting the enforcement of the I.R.S. administrative summons. *Donaldson, supra; Newman, supra; Roundtree, supra; Venn, supra; Egenberg, supra; Campbell, supra; Acker, supra; Vey, supra; and United States* v. *Theodore,* 347 F.Supp. 1070 (D.S.C., 1972).

The circuits' application of the above enumerated "constants" has caused the conflict within the judicial system. The difference in the application of the three (3) enumerated "constants" must be reconciled by this Court. *e.g.* "constant number (1)": *Powell* dictates that such minimal standards of proof are mandatory requirements that must be shown by the pleadings and proof of the Government before the Court's process can be invoked to enforce compliance with an I.R.S. administrative summons, *see also, Donaldson, supra; Wild, supra,* at 208; *Pritchard, supra,* at 931; *Harrington, supra,* at 524; *Egenberg, supra,* at 515, *Berkowitz, supra,* at 900; *Campbell, supra,* at 713; but *Newman, supra,* at 169, holds that "Before the Government is called upon to make this [*Powell*] showing, the summoned party must raise in a substantial way the existence of substantial deficiencies[17] in the summons proceedings. • • •" (*emphasis ours*), thus shifting the burden to the taxpayer to meet the requirements of "constant number (3)" prior to the Government having to present even a *prima facie* case for enforcement in compliance with the requirements of "constant number (1)". Further, in *Schoeberlein, supra,* 1059, the Respondents argued that the Government was not entitled to the documents requested by an I.R.S. administrative summons because the Government did not allege and prove that the records were not already within its possession, relying on *Pritchard, supra,* at 971, but the Court held "that the information sought is not already within the Commissioner's possession". Thus, the Court completely

ignored the *Powell* mandate, made a conclusion unsupported by the pleadings and proof, and completely defeated the "right to a adversary hearing" concept of "constant number (2)"; this was done despite the rationale that, in enforcement proceedings relating to an I.R.S. administrative summons, a petition for enforcement followed by a show cause order is treated as a complaint and governed by the Federal Rules of Civil Procedure. *See, Powell, supra,* 379 U.S. at 58, N. 18; *Wild, supra,* at 169.

The concept that *Powell* and its progeny expressly prohibits enforcement of an I.R.S. administrative summons absent the Government's pleading and proof that the information sought was not already within the Commissioner's possession was, at least implicity, recognized in *Berkowitz, supra,* at 901, which agreed with the Court in *Theodore, supra,*

> "that the language of *Powell* is not so broad as to cover the instant situation where the information sought is already in the Commissioner's possession, but it is impossible or unjustifiably difficult and expensive to identify."

Also, *Matras, supra,* at 1275, explicitly recognized that the burden of proof is with the Government to show that the information sought by an I.R.S. administrative summons was not already with the I.R.S.'s possession.

The conflict in application of the "enumerated constants" of *Powell* and its progeny by the circuits must be reconciled by an authorative decision by this Court. Does the Government have the burden of pleading and proving a *prima facie* case that the information sought by the issuance of an I.R.S. administrative summons is not already within the Commissioner's possession prior to the arising of the taxpayer's burden of having to show an abuse of the Court's process, *see, Campbell, supra; Pritchard, supra,* or does the taxpayer have to first raise in a substantial way the existence

of substantial deficiencies in the summons proceedings before the Government has to make any showing in compliance with the *Powell* doctrine? *Newman, supra,* at 169. Better yet, can the Court just *conclude* that the Government does not have the information sought by the summons, as it did in *Schoeberlein,* without any pleadings or proof by the Government that would support such a conclusion? Can there be a true "adversary hearing" if the taxpayer has no knowledge or notice of whether the Government does or does not already have the information sought within its possession? It must be noted that in the instant case the Government neither plead nor offered any evidence in support of the proposition that it did not already have such information. It is axiomatic that the taxpayer can answer responsively only those averments which the Government sets forth in its claim for relief, Rule 8, F.R.Civ.P. Further, the taxpayer may raise the question of the sufficiency of the evidence to support the findings of fact made in actions tried by the Court without a jury after said findings are in fact entered in the Court's record even though the party raising the question has not made an objection to such findings, a motion to amend them, or a motion for judgment in the district court. Rule 52, F.R.Civ. P. Thus, a complete failure by the Government to plead or prove that the information sought by the eight (8) summonses in issue was not already within their possession and the District Court's order that Mr. Martinez had to comply with said eight (8) I.R.S. administrative summonses raises not only the issue of the conflict between the circuits but also the very real question as to the sufficiency of the evidence to support said District Court's order.

CONCLUSION

For the foregoing reasons the Petitioner respectfully urges that this petition for the writ of certiorari should be granted.

Respectfully submitted,

William Benjamin House, Jr.
711 Main Street, Suite 700
Houston, Texas 77002
(713) 229-8681

Counsel for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit were mailed by certified mail to Michael Rodak, Jr., Clerk of the Supreme Court of the United States, Office of the Clerk, Washington, D.C. 20543, to Mr. Gilbert E. Andrews, United States Department of Justice, Washington, D.C., and Mr. Ed. McDonough, United States Attorney, 515 Rusk Avenue, Houston, Texas, on this the 2nd of January, 1976.

William Benjamin House, Jr.

NO. 75-992

In the Supreme Court of the United States

OCTOBER TERM, 1975

CARLOS M. MARTINEZ,
Petitioner

versus

UNITED STATES OF AMERICA and JOHN T. RUSSELL, Special Agent, Internal Revenue Service,
Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. B. "Bennie" House, Jr.
Mayhe, House & Bobbet, Inc.
711 Main Street - Seventh Floor
Houston, Texas

ATTORNEYS FOR PETITIONER

A B Letter Service, Inc.,327 Chartres St.,New Orleans, La.(504)581-5555

INDEX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FILED: Feb. 10, 1975
Clerk, U.S. District Court
Southern District of Texas
V. Bailey Thomas, Clerk
By: (Signature Illegible)
Deputy

UNITED STATES OF AMERICA and
JOHN T. RUSSELL, Special Agent
Internal Revenue Service,
Petitioners

MISCELLANEOUS

v.

NO. 75-H-2

TRANSCONTINENTAL ARTIST
CORPORATION, ET AL.,
Respondents

Edward B. McDonough,Jr., United States Attorney, John T. Johnson, Assistant United States Attorney, Houston, Texas, Richard A. Scully, Department of Justice, Washington, D.C., for petitioners.

John Brown and Charles E. Orr, Houston, Texas, for respondents.

BENCH RULING FROM LOWER COURT

On February 10, 1975, the Court convened to conduct a show cause hearing to determine whether respondent Carlos M. Martinez, also known as Charles Martinez, should comply

with summonses issued by the Internal Revenue Service (IRS) to respondent as custodian of eight corporations or entities believed to possess certain corporate records containing information pertinent to an investigation of potential civil tax liability of Mr. Martinez. Testimony was heard, and exhibits were offered into evidence. Some of the exhibits were not properly certified, and the Court conditionally admitted these documents pending their proper certification. It is understood that the Court's determination of the issues raised in the petition of the Internal Revenue Service is conditioned upon prompt certification of the subject documents, which should be obtained immediately by appropriate representatives of the petitioner.

After considering the evidence proffered and the applicable law, the Court concludes that Mr. Martinez should be, and he hereby is, ordered to comply in all respects with the eight summonses issued on July 31, 1974, pertaining to the corporate records of Transcontinental Artist Corporation, General Ornament Corporation, Studio Theater of San Antonio, Inc., Studio Theater of Austin, Inc., Studio Theater of Corpus Christi, Inc., Studio Theater of El Paso, Inc., Studio Theater of Fort Worth, Inc., and Cine 16 of Dallas, Inc. The Court issues the following bench ruling to elaborate upon its reasons for this holding. The Court reserves the right to expand upon this ruling, which has been issued on the same afternoon as the hearing was conducted for the convenience of the parties, to incorporate formal findings of fact and conclusions of law, with full citation to case authority, if appropriate.

Respondent Martinez contends that the above-named corporations or entities may not really be corporations, that Mr. Martinez is appearing solely in his individual capacity, and that Mr. Martinez will neither "admit nor deny" that he

is custodian of the records of these "entities", for fear that by doing so, he will incriminate himself and become subject to criminal prosecution. Mr. Martinez further contends that by producing the records alone, the act of production would constitute "speaking action" which could be held to incriminate him in violation of his Fifth Amendment privilege against self-incrimination. In support of his legal position, Mr. Martinez directs the Court's attention to: *Morgan v. Thomas*, 448 F.2d 1356 (5th Cir. 1971); *United States v. Pollock*, 201 F.Supp. 542, from the Western District of Arkansas in 1962, and *Curcio v. United States*, 354 U.S. 118 (1957). Respondent has additionally pointed to *United States v. Held*, 435 F.2d 1361 (6th Cir. 1970), as supportive of his position.

The instant case involves a civil investigation conducted by the Internal Revenue Service to determine whether respondent Martinez should be liable for further taxes. The uncontroverted testimony of the Internal Revenue Service Special Agent who testified in this case indicates that the investigation is presently being, and has always been, conducted solely to determine whether Mr. Martinez owes more tax. At no time has any criminal investigation been put into operation.

In pursuit of its investigation, the IRS through its Special Agent issued summonses on July 31, 1974, requesting only production of certain corporate records of the eight above-named corporations or entities. The summonses were addressed to respondent Martinez as custodian for these corporations, either as corporate president, or as general manager. The Court concludes that those reasons prompting the request for production of the corporate records were good faith reasons and have occurred well prior to any possible

criminal prosecution. In fact, there has been no evidence to indicate that any criminal prosecution will ever occur.

Respondent Martinez challenges service of the summonses on him. He contends that he is not the custodian, and that the United States, as petitioner, has the burden to demonstrate that he is the custodian, and that he must produce the records. The Court cannot agree with even this threshold contention of the respondent. The Court concludes that, according to the holding of the United States Supreme Court in *Donaldson v. United States*, 400 U.S. 517, at page 536, when an internal revenue service summons is issued in aid of an investigation and is issued in good faith and prior to any recommendation for a criminal prosecution, the respondent to the summons must either comply or demonstrate the deficiencies of the summons. The burden so to prove deficiencies is on the respondent.

To the Court, the burden is therefore on the respondent in the instant case to demonstrate the deficiencies of the summons. Such imposition of the burden not only comports with the *Donaldson* case, but also comports with the interpretation of that case by the United States Court of Appeals for the Fifth Circuit in *United States v. Newman*, 441 F.2d 165 (5th Cir. 1971) (see especially at page 169). Respondent contends that the summons is deficient because he should not be served with it. Respondent neither admits nor denies that he is the proper custodian for the records, but only states that for him even to produce the records would be in violation of his Fifth Amendment privilege against self-incrimination, and he contends further that the Fifth Amendment protects him from saying or doing anything which he feels would incriminate him.

The Court is totally at a loss to understand how a person

who refuses to acknowledge his affiliation with a corporation or entity has the right to claim any privilege regarding records which belong to the corporation. The same holds true for corporate "entities", or any organization holding itself out to be an independent entity and formally organized with regard to filing federal corporate income tax returns, or filing state corporate charters.

Even though proper invocation of the privilege thus remains in doubt in this case, the Court concludes that there is no merit to this position. The uncontroverted testimony offered before this Court indicates that in conversation with the special agent from the IRS, after being fully informed of his constitutional rights to remain silent, respondent Martinez indicated that he was corporate president of General Ornament Corporation, and general manager of the other six named corporate "entities". Other official state documents indicate that he was corporate president of Transcontinental Artists Corporation. The Court concludes that Mr. Martinez was indeed, and in fact, the custodian of the records of these entities.

The Court further concludes, on the basis of the recent Supreme Court holding in *Bellis v. United States*, 414 U.S. 907 (1974), that whether Transcontinental and General Ornament are still in existence or not, and whether the other six named "entities" were ever incorporated or not, all eight of these entities are independent entities, each having an established institutional identity independent of the respondent Martinez.

With summonses thus properly issued as to these entities, and with Mr. Martinez as their custodian, it must next be determined whether, and the extent to which, if at all, Mr.

Martinez is entitled to invoke a Fifth Amendment privilege as to the matters contained in the requested records. Respondent Martinez does not contend that the records are his personal records. It is well-settled that an individual cannot rely upon the privilege provided in the Fifth Amendment to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally. *See Wilson v. United States*, 221 U.S. 361 (1911); and *United States v. White*, 322 U.S. 694 (1944). It is further well-settled, under the *Curcio* case,*see Curcio v. United States*, 354 U.S. 118 (1957), see especially page 125, that a custodian of corporate records overrides any self-incrimination privilege when he accepts his custodianship.

In *Curcio* the Supreme Court went on to hold, in response to a contention which has been similarly raised by respondent in this Court today, "that the Custodian's act of producing books or records in response to a subpoena is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself. The custodian is subjected to little, if any, further danger of incrimination." Such an act is what is complained of today by respondent, and it is such an act that this Court is ordering the respondent, as custodian for the records of the eight entities mentioned above and in the summonses, to produce. The Court does not find, as the Supreme Court discussed in *Curcio*, that the IRS is attempting to compel the custodian to disclose the location of documents he has failed to produce. Rather, the Court concludes that what is requested by the summonses does pertain solely to corporate records, and in all matters the summonses comply with Supreme Court directives in *Donaldson*, *Curcio* and *Bellis*, as

interpreted by the Fifth Circuit in *Newman*, and the United States Court of Appeals for the Sixth Circuit in *United States v. Held*. 435 F.2d 1361(6th Cir. 1970).

The *Pollock* case cited by respondent is inapposite to the question now before the Court because the Government there was moving for criminal contempt for failure to comply with a court order directing delivery of certain records. The issue here does not reach that point, and the IRS herein seeks only to have the respondent Martinez comply with its summonses as custodian of corporate records. The Court would further note that *Pollock*, a district court case,may not be good law any longer in view of the recent Supreme Court decisions pertaining to standards applicable to criminal contempt proceedings. *Morgan v. Thomas*, another case cited by respondent, is also inapposite to the instant case, ruling as it does on a habeas corpus proceeding arising out of enforced compliance with a state court ruling enforcing a contract for surety governed by state law. The present case involves a question of federal law which has directly been ruled upon by the Supreme Court and the Fifth Circuit. The Court does not consider the above two cases, or any other case cited by respondent, to further his position, or do anything more than strengthen the position of the IRS.

The Court therefore directs that the petition to enforce the summonses referred to in this case should be, and hereby is, granted. The respondent Martinez is directed to comply immediately by producing all of the requested materials described in the summonses.

IT IS SO ORDERED.

DONE at Houston, Texas, this 10th day of February, 1975.

s/ Carl O. Bue, Jr.
United States District Judge

ORDER STAYING ENFORCEMENT OF BENCH RULING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FILED: Feb. 20, 1975
Clerk, U.S. District Court
Southern District of Texas
V. Bailey Thomas, Clerk
By: (Signature Illegible)
Deputy

UNITED STATES OF AMERICA and
JOHN T. RUSSELL, Special Agent
Internal Revenue Service,
Petitioners,

v.

TRANSCONTINENTAL ARTIST
CORPORATION, ET AL.,
Respondents

MISCELLANEOUS

NO. 75-H-2

Edward B. McDonough, Jr., United States Attorney, John T. Johnson, Assistant United States Attorney, Houston, Texas, Richard A. Scully, Department of Justice, Washington, D. C., for petitioners.

John J. Browne and Charles E. Orr, Houston, Texas, for respondents.

ORDER STAYING ENFORCEMENT OF BENCH RULING

The motion of respondent Carlos M. Martinez to stay

enforcement of this Court's Bench Ruling of February 10, 1975,pending appeal is granted at this time.On February 10, this Court granted the motion of the petitioner to enforce summonses issued by a special agent of the Internal Revenue Service and overruled respondent Martinez' attempted invocation of a Fifth Amendment privilege.

Respondent now seeks to appeal this Bench Ruling, *see* Respondent's Notice of Appeal (February 14, 1975), and has requested this Court to stay enforcement of its order pending appeal. *See* Respondent's Motion to Stay (February 14, 1975). Respondent contends that normal enforcement of the order would effectively render useless the utilization of the appellate process.

Upon reviewing applicable law, the Court has concluded that the February 10 Bench Ruling is a final appealable order. 28 U.S.C. § 1291; *see Falsone v. United States*, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953); *United States v. Secor*, 476 F.2d 766 (2d Cir. 1973). Appeal is therefore proper at this time, and the Court agrees that by not staying its order, this Court would render any appellate relief meaningless for respondent. The Court concludes that the status quo prior to this Court's ruling of February 10 should be maintained pending appeal. Neither party should take any action which would prejudice or be detrimental to the interests of the other.

The Court directs counsel for the petitioner to notify the Court if the appeal is not diligently pursued by filing an appropriate request for rescission of this stay.

DONE at Houston, Texas,this 20th day of February,1975.

s/ Carl O. Bue, Jr.
United States District Judge

NOTICE OF APPEAL OF CARLOS M. MARTINEZ

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Filed: Feb. 14, 1975
Clerk, U.S. District Court
Southern District of Texas
V. Bailey Thomas, Clerk
By: (Signature Illegible)
Deputy

UNITED STATES OF AMERICA and
JOHN T. RUSSELL, Special Agent of
the Internal Revenue Service,
Petitioners MISC. C.A. NO. 75-H-2

vs.

TRANSCONTINENTAL ARTIST
CORPORATION; GENERAL
ORNAMENT CORPORATION, et al.
Respondents

NOTICE OF APPEAL

Carlos M. Martinez, a Respondent in the above entitled cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order entered February 10, 1975.

Respectfully submitted,

s/ John J. Browne
JOHN J. BROWNE
Attorney for Respondent Martinez
609 Fannin Street Suite 629
Houston, Texas 77002 224-5341

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served on the Petitioners by hand delivering same to the office of Anna Stool, Assistant United States Attorney, 515 Rusk Avenue, Houston, Texas, on this the 14th day of February, 1975.

s/ John J. Browne
JOHN J. BROWNE

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
BY: S/ (Signature Illegible)
Deputy Clerk
(SEAL)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 75-1787
Summary Calendar*

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent of the Internal Revenue Service,
Petitioners-Appellees
versus

TRANSCONTINENTAL ARTIST CORPORATION, ET AL.,
Respondents,

CARLOS M. MARTINEZ,
Respondent-Appellant

Appeal from the United States District Court for the Southern District of Texas

(August 5, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

---

*Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al, 5th Cir., 1970, 431 F.2d 409, Part I.

1- See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir., 1970, 430 F.2d 966.

PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1787

Filed: Oct 3, 1975
U.S.Court of Appeals
Edward W. Wadsworth
Clerk

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent of the Internal Revenue Service,
Petitioners-Appellees,

versus

TRANSCONTINENTAL ARTIST CORPORATION, ET AL.,
Respondents,
CARLOS M. MARTINEZ,
Respondent-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING
(October 3, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

OFFICE OF THE CLERK
October 14,1975 600 Camp
New Orleans,La. 70130
(504) 527-6514

Mr. V. Bailey Thomas, Clerk
U. S. District Court
P. O. Box 61010
Houston, Texas 77208

RE: No. 75-1787 - U. S. A., et al vs. Transcontinental Artist Corporation, et al; Carlos M. Martinez
(District Court No. CA 75-H-2)

Dear Sir:

(XX) Enclosed is a certified copy of the RULE 21 DECISION judgment of this Court in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

( ) Copy of the Court's opinion.

(X) Original record on appeal or review. & Suppl.

(X) Original exhibits.

(X) Bill of Costs approved by this Court.

( ) The judgment provides that appellee pay the costs in this Court. Since the case was docketed in forma pauperis without pre-payment of fees and costs, the Clerk's docketing fee of $25.00 is now payable to this office by appellee, and by copy of this letter counsel is being so advised.

Very truly yours,

Edward W. Wadsworth, Clerk

By s/ Carol G. LeSage
Deputy Clerk

Enc. (BIIL OF COSTS ONLY)
cc: Messrs. John J. Brown
Charles E. Orr
Mr. W. B. "Bennie" House, Jr.
Mr. Edward B. McDonough, Jr.
Hon. Scott P. Crampton
Messrs. Gilbert E. Andrews
Robert E. Lindsay
Robert A. Bernstein

MANDATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Clerk, U. S. District Court
Southern District of Texas
Filed: Oct 17, 1975
V. Bailey Thomas, Clerk
By: (Signature Illegible)
Deputy

DO NOT PUBLISH

MISC. NO. 75-H-2

No. 75-1787
Summary Calendar*

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent of the Internal Revenue Service,
Petitioners-Appellees,
versus

TRANSCONTINENTAL ARTIST CORPORATION, ET AL.,
Respondents,
CARLOS M. MARTINEZ,
Respondent-Appellant

Appeal from the United States District Court for the
Southern District of Texas

(August 5, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Costs are taxed against respondent-Appellant.

---

* Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al, 5th Cir., 1970, 431 F.2d 409, Part I.

1 - See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir., 1970, 430 F.2d 966.

Issued as Mandate: Oct. 14, 1975

A true copy
Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit

By: s/ Carol G. LeSage
Deputy
New Orleans, Louisiana

Oct 14, 1975

ORDER DENYING APPLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. Court of Appeals
Filed: Oct 26, '75
Edward W. Wadsworth
Clerk

NO. 75-1787

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent of the Internal Revenue Service,
Petitioners-Appellees,

versus

TRANSCONTINENTAL ARTIST CORPORATION, ET AL.,
Respondents,

CARLOS M. MARTINEZ,
Respondent-Appellant

Appeal from the United States District Court for the
Southern District of Texas

O R D E R: -

Treating appellant's motion for stay of mandate as an

application to recall and stay the mandate previously issued on October 14, 1975 pending the timely filing of a petition for writ of certiorari in the United States Supreme Court; IT IS ORDERED that the application be, and the same is hereby denied.

s/ Thomas Gibbs Gee
UNITED STATES CIRCUIT
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the Appendix to Writ of Certiorari has this day been served on Gilbert E. Andrews, U.S. Department of Justice, Washington, D.C.; Edward B. McDonough, Jr., U. S. Attorney, 515 Rusk Avenue, Houston, Texas 77701 and Hon. Robert H. Bork, Solicitor General, U. S. Department of Justice, Washington, D. C., 20530, by placing same in the U.S. Mail, postage prepaid, this 12th day of January, 1976.

W. B. "Bennie" House, Jr.

No. 75-992

In the Supreme Court of the United States

OCTOBER TERM, 1975

CARLOS M. MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-992

CARLOS M. MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

We invite the Court's attention to the following facts which indicate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on August 5, 1975 (Pet. App. 12). A petition for rehearing was denied on October 3, 1975 (Pet. App. 13). The 90-day period under 28 U.S.C. 2101(c) within which a petition for a writ of certiorari in a civil case must be filed expired on January 2, 1976, and no extension of time for petitioning was obtained. The petition was not filed until January 3, 1976. Since the time limit specified by 28 U.S.C. 2101(c) is jurisdictional, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

DOJ-1976-02